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IN THE

Supreme Court of the United States

TERM, 1942.

No. 1220

FRANK CARMINE NARDONE and NATHAN W. HOFFMAN,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Frank Carmine Nardone,
and
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SUPREME PRINTING COMPANY, LAW PRINTERS, BARCLAY 7-0349

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Supreme Court of the United States

TERM, 1942.

FRANK CARMINE NARDONE and NATHAN W. HOFFMAN, Petitioners, against UNITED STATES OF AMERICA, Respondent.	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners respectfully pray that a Writ of Certiorari issues to review the judgment of the Circuit Court of Appeals for the Second Circuit entered April 7, 1942, affirming a judgment of conviction in a criminal case.

Opinions Below.

There was no opinion in the District Court, but there were findings of fact and conclusions of law expressive of the court's opinions on the preliminary hearing (R. pp. 206-211 inclusive).

The opinion of the Circuit Court of Appeals in this cause is reported at the end of the record, the numbers of the pages not being now available to petitioners.

Jurisdiction.

The jurisdiction of this court is invoked under Section 24a of the Judicial Code as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.)

Questions Presented.

1. Whether the evidence did not show that the case against petitioners and a substantial part of the evidence was derived from unlawful interceptions of telegraph and telephone communications.

2. Whether the evidence obtained and derived from such interceptions was so inextricably mixed with other evidence as to be inseparable and whether, therefore, all of the evidence in both of these categories was inadmissible.

3. Whether there was not reversible error upon the part of the trial court in refusing to instruct the jury that, before considering the declaration of an alleged coconspirator against the defendants, they must be satisfied beyond a resonable doubt that the defendant had entered into the conspiracy.

Statutes Involved.

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103, Title 27, Section 605:

> "No person receiving or assistant in receiving or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or au-

thorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a Court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio, and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Title 18, Section 88, of the United States Code:

(Criminal Code, Section 27.)

"Conspiracy to commit offense against the United States. If two or more persons conspire either to commit any offense against the United States, or to

defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years or both. (R. S. Section 5540; May 17, 1879, c. 8, 21 Stat. 4; March 4, 1909, c. 321, Section 37, 35 Stat. 1096.)"

Title 18, Section 550, of the United States Code:

(Criminal Code, Section 332.)

"PRINCIPLES" DEFINED. "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures, its commission, is a principal. (R. S. Sections 5323, 5427; Mar. 4, 1809, c. 321, Section 332, 35 Stat. 1152.)"

Title 19, Sections 1593 (a) and 1593 (b), of the United States Code:

"SMUGGLING AND CLANDESTINE IMPORTATIONS—FRAUD ON REVENUE.

(a) If any person knowingly and willfully, with intent to defraud the revenue of the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customs house by false, forged, or fraudulent invoices, or other document or paper, every such person, his, her, or their aiders and abetters, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisonment for any term of time not ex-

ceeding two years, or both, at the discretion of the court.

IMPORTATION CONTRARY TO LAW.

(b) If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both."

Statement.

In view of the fact that this cause has been before the court on two other occasions, a very brief statement will probably suffice. The theory of the prosecution was that there was a scheme on the part of the defendants and others, including the Government's principal witness, Leveque an old offender, to operate, control and use a number of boats for the purpose of bringing alcohol into the country without the payment of tax and without proper entry. This was the conspiracy count of the indictment. There were also substantive allegations, accusing the defendants of bringing a large quantity of alcohol into the country in a particular instance and a companion count accusing them of unlawful possession and concealment of the alcohol thus introduced into the country. Leveque was in the business, according to the Government's contention, before he met Nardone and Hoffman, but subsequently it was charged that they en-

tered into the scheme. It appears that the scheme was not one but multiple, but the theory of the prosecution was that the various schemes were united by common interests and purposes of the parties entering the scheme at various times. The details of the operations would probably not be helpful to the court in consideration of the present application.

It appears that the Government's officer, William E. Dunnigan, Assistant Supervisor of the Alcohol Tax Unit, Treasury Department, who supervised the investigation and preparation of this case, had vague information and suspicions that a so-called international group were engaged in smuggling alcohol. This information in the beginning came from an informer named Murray, who did not know Nardone or Hoffman. At the instance of Dunnigan, Murray talked with Leveque and received little information, but Leveque is said to have mentioned petitioners (R. p. 39). There was also some information obtained from Government officers as to the loading of certain vessels with alcohol aboard. Finally Dunnigan is said to have heard that some of the group were meeting at the Astor Hotel, New York (R. p. 133). One Dunn, Dunnigan's investigator, went to the hotel and observed several men meeting there, sending telegrams and making telephone calls (fols. 478-485). Apparently the petitioner, Nardone, was not one of the group observed by Dunn. However, it was assumed by the Government on the basis of other information that Nardone and Hoffman were part of the group. Dunn had no information as to the telegrams, telephone calls or business of the group. Dunnigan caused the investigator to procure without a subpoena the contents of two telegrams sent by the group. It was obvious that the effort was to build a case against the group, although the persons were not yet identified and there was no concrete evidence of any violation of law. The telegrams, the contents of which were thus inter-

cepted without any legal process, became Government's Exhibit 2 at the preliminary hearing in the trial court. After this interception the Government caused a search to be made among telegrams and telegraphic money orders sent by the same group. The search was made without any subpoena and Dunnigan, who caused it to be made, had no information with respect to the allegations of the indictment before he made the search of the telegraph records ((p. 298-299). The Government paid for the search. A subpoena was subsequently issued and the original telegrams of the two collections of telegrams, which became Government's Exhibit 3 at the preliminary hearing, were thus obtained by subpoena, after their contents had already been learned by a search without any process (R. fol. 304, *et seq.*).

When Dunnigan was asked about his information prior to the interceptions, he answered:

> "yes, I had all kinds of information about bringing it in, but it was not the type of evidence that we could use" (R. fol. 326).

The interception of the telegrams was undoubtedly the starting point of the prosecution, which translated a few vague suspicions into definite knowledge. On cross examination Dunnigan admitted this fact:

> "Q. So that from the telegrams and from the taps you got enough information to lead you from the suspicious stage to the factual stage? A. I said from the telegrams.
>
> Q. From the telegrams. All right. A. Yes, in my own mind. That is before the taps went on" (fols. 410-411).

He also testified as follows on this subject:

> "Q. In other words it was the telegrams that aided you in coming to the conclusion that Nardone and the others were in this conspiracy, isn't that so? A. Yes. Telegrams and associations" (fols. 382-383).

In the previous appeals in this case reliance was based mainly on telephonic intercepticns and they are involved also on this application. It seems clear that the Government knowing that it was at fault, sought as far as possible to steer clear of them and overlooked the fact that the interception of telegrams is equally within the ban of the statute. As to the telephone tapping, it began on December 20, 1935, and the testimony of Kosac on this subject given at a previous trial was included by stipulation in the present record (491-515). Kosac, who recorded the interceptions, listened to conversations of Leveque, the Government's principal witness with Nardone, and listened to Nardone both sending and receiving communications (fol. 493).

When the Government agents and the Assistant District Attorney were examining Leveque prior to the trial they told him of the telephone "taps" (fol. 821). They also showed him one of the intercepted telegraphic money orders and questioned him about it (fol. 823). That was as far as Leveque's admissions went, but the truth in all probability was that the questioning did not stop there and that all available sources of information, including all the telephone "taps" and all the intercepted telegrams and telegraphic money orders, were used to get as complete a story from Leveque as possible.

It is clear that Dunnigan had no information that would have enabled him to proceed against anybody prior to the interception of the telegraphic messages and that he had the search of the telegrams and the tele-

graphic money orders made in order to obtain information, which he did not then possess (fols. 297-298).

A vital portion of the indictment is clearly based upon the information obtained by the illegally seized telegrams (fol. 28).

The observations of appellants and others by Government agents afforded evidence only of their association, but not as to what they were doing together. In answering a question on this point Dunnigan said that as to their activities he knew "nothing more than the three telegrams indicated" (fol. 383).

With respect to the three telegrams, which were seized without any process and which were used at the preliminary hearing in the trial court, these documents were not used in evidence at the subsequent trial before the jury. The trial court found that these three telegrams were unlawfully obtained (fol. 583). The court also found that the tapping of the telephone wires was unlawful and that information flowing from either the intercepted telephone conversations or the intercepted telegrams could not be admitted in evidence. The trial court also found that even if there had been no unlawful interceptions of telephone and telegraph messages, it could be assumed that the Government by watching the defendants could have gotten the information (fols. 586-587).

The Circuit Court of Appeals, interpreting this court's decision in the first and second Nardone cases (302 U. S. 379; 308 U. S. 338) stated that although there had been violations of law in the interceptions these would not bar the prosecution and the prosecution might be considered to have "purged itself of its unlawful conduct", if it were proved to the satisfaction of the trial judge that the interceptions did not lead to the discovery of any of the evidence used upon the trial or to break down the resistance of any unwilling witnesses. In this respect it is urged that the court was in error decided contrary to the record and erroneously assumed that the

interceptions did not lead to the discovery of the evidence used upon the trial. The whole structure of the case was built on the unlawful interceptions. Before they were made the Government had nothing but suspicions. The concrete evidence afforded by the interceptions made the case.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals misinterprets the decision of this court in the second Nardone case (308 U. S. 338), which held not only that the records of the interceptions were inadmissible, but also that everything derived from such interceptions was inadmissible. It is submitted that the question is not merely one of technical admissibility, but one of broad public policy.

2. The evidence derived directly or indirectly from the interceptions was so inextricably mixed with the other evidence both in the preparation of the trial and at the trial itself that the evidence in these two categories could not be separated. It would be impossible for the court to say that the other evidence was free from the taint of the evidence illegally obtained.

3. It is a matter of well settled law that no act or declaration of a conspirator may be considered against a defendant unless and until the jury is convinced beyond a reasonable doubt that the defendant had entered into the conspiracy. The logical sense of the rule is apparent and has never been questioned as far as we are informed. It was particularly applicable and vital in this case, because there were so many phases of the alleged conspiracy and so many persons acting independently of the petitioners and unknown to them.

POINT I.

There was prejudicial error in the Court's refusal and a failure to follow this Court's decision in *Nardone* vs. *United States*, 308 U. S. 338, that the evidence offered was derived from unlawful interceptions of telegrams, telegraphic money orders and telephonic communications.

It was admitted by the Government that there had been interceptions of telephonic communications, or wire tapping as it is commonly called (fol. 67). The concession was necessarily made because the evidence at the two prior trials had conclusively established the interceptons. The question now presented was brought up by means of a written stipulation between the Government and the appellants outlining the matters to be considered on the preliminary inquiry and provided that the application for the supression of evidence might be made orally at the trial. The provision for an oral motion had no special significance, because the written stipulation already entered into had sufficiently defined the motion (fols. 59-64).

At the preliminary hearing the stipulation was amended, so as to include telegraphic communications and money orders within the scope of petitioner's motion for the suppression of evidence.

At the first and second trials and to a great extent at the third trial, which is now under review, stress was laid on the tapping of telephones, but the interceptions of telegraphic messages, which obviously are equally within the provisions of the statute, were ignored. The record showed that the first unlawful interceptions were interceptions of telegrams and telegraphic money orders. After some efforts through an informer to get evidence of unlawful activities, which resulted in nothing more than vague rumors and suspicion of undefined crimes, an

individual for the Government working under William E. Dunnigan, Assistant Supervisor of the Alcohol Tax Unit, who was in charge of the investigation, observed some of the supposed criminal group at the Hotel Astor, New York. The Government in its prosecution proceeded upon the theory that petitioners were part of this group. The investigator saw some of the group telephoning and sending messages by telegrams. Without a subpoena or legal process of any kind the Government agents first attempted to get copies of three telegrams from the girl in charge of the telegraph station. Failing in this they exerted their influence or pressure on the Western Union Company itself and procured three telegrams sent by the group. No argument to sustain the interception of these telegrams is possible and none was seriously attempted in either of the courts below. The trial court's finding that they were obtained illegally is beyond rational controversy. Dunnigan, the chief in charge of the investigation and formation of the case, speaking of evidence as to the smuggling of liquor said:

> "Yes, I had all kinds of information about bringing it in, but it was not the type of evidence that we could use" (fol. 326).

Then he added:

> "The first three telegrams absolutely convinced me in my own mind that a conspiracy had been entered into and it warranted any further investigation that was possible" (fol. 409).

Furthermore, on cross examination, Dunnigan testified as follows:

> "Q. So that from the telegrams and from the taps you got enough information to lead you from the suspicious stage to the factual stage? A. I said from the telegrams.

Q. From the telegrams. All right. A. Yes, in my own mind. That is before the taps went on" fols. 410-411).

And again he testified:

"Q. In other words it was the telegrams that aided you in coming to the conclusion that Nardone and the others were in this conspiracy, isn't that so? A. Yes. Telegrams and associations" (fols. 382-383).

These telegrams showed that the group was sending messages and money to Canada.

The unlawful copying of these telegrams was followed by an extensive search of the Western Union records procured and paid for by the Government at the instance of Dunnigan and his fellow agents. After the search a subpoena for some of the material revealed by the search was issued (fol. 145).

The telephone tapping began on December 20, 1935 and Kosac, another investigator of the Alcohol Tax Unit, did the listening on the tapped wires. His testimony at the prior trial was included by stipulation as part of the evidence at the preliminary hearing (fols. 491-515). It showed that Kosac listened to conversations of Leveque, the Government's principal witness, with Nardone and listened to Nardone both sending and receiving communications (fol. 493). A number of Government agents, including agents of the Alcohol Tax Unit and the Customs Service, participated in the investigation and records of these interceptions were made available to all the investigators (fols. 494-496).

When Leveque was examined among the few admissions favorable to the appellants, which were wrung from him were

1. That the Government agents and the Assistant District Attorney when examining Leveque prior to the trial told him of the telephone taps (fol. 821).

2. That they showed him a telegraphic money order (fol. 823) and questioned him about it.

The only reasonable conclusion that can be drawn from the circumstances is that the agents who had the records of the unlawful telegraphic and telephonic communications and the unlawfully intercepted telegraphic messages and money orders, used them freely according to their best judgment in the interrogation of Leveque and other witnesses and in the preparation of the case for the grand jury and for the various trials.

It is clear that Dunnigan had no information that would have enabled him to proceed against anybody prior to the telegraphic messages (fols. 297-298). He had the search of the telegrams and telegraphic money orders made in order to obtain information which he did not then possess (fols. 298-299).

A vital portion of the indictment is clearly based upon the information obtained by the illegally seized telegrams (fol. 28).

It is clear that from the early stages of the investigation and throughout the preparation the case against petitioners was built upon unlawful interceptions of telegrams and telegraphic money orders, as well as upon the unlawful tapping of telephone wires. Clues and leads of the most vital importance in the making of the case came directly from the interception of telegrams, as well as the wire tapping. To require petitioners to specify all of the consequences of the unlawful interceptions would be to place upon petitioners a burden impossible to sustain. Only one in the complete confidence of the Government would have such information. It is urged that in building its case against petitioners the Government's re-

liance for a substantial part of the case was placed upon these interceptions and a substantial part of the structure was built upon the illegal information. The effort at the third trial was to circumvent the law laid down by this court and to benefit to the fullest extent by the interceptions without using the immediate results directly. By indirection the same purpose was accomplished. The foundation of this case was laid in violations of law. With the exception of Leveque, whose alleged connection with petitioners and other members of the group was undoubtedly disclosed by the tapped telephone messages and the other interceptions, and Geiger, whose name was also used in the telephone messages, witnesses whose connection with the alleged crime were disclosed by the interceptions, were kept off the stand, but the messages obtained were used to obtain other witnesses, whose names were not directly disclosed by the interceptions. The inevitable logical implications of the decision of this court in *Nardone* v. *United States*, 308 U. S. 338, and in fact the express rule laid down in that case were evaded and the decision was practically nullified by the successful indirect use of the fruits of illegality. The decision of the appellate court below in effect give approval to the making of a case by unlawful methods so long as the fruits of the interceptions are not directly utilized in the formal proof of the crime at the trial. Even this rule was violated, because clearly Leveque was a witness, whose connection with the crime was revealed by the interceptions. It is urged that in order to make the rule laid down in the second *Nardone* case effective the method employed by the Government in this case must be held to be within the ban of the statute.

In *Nardone* vs. *United States*, 308 U. S. 338, 340, this court called attention to and approved the rule laid down in *Silverthorne* v. *United States*, 251 U. S. 385:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely

> evidence so acquired shall not be used before the court, but that it shall not be used at all."

In the second *Nardone* case, 308 U. S. 333, this court speaking of its decision in the first *Nardone* case with respect to the tapping of telephone wires which is still an element in this case said:

> "To forbid the direct use of methods thus characterized, but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty' ".

There can be no question that there was a full indirect use of the unlawfully acquired evidence, obtained by interceptions of telephone wires and telegrams, to procure the indictment, to lay the foundation of the case now before the court and to prepare that case, obtain witnesses and carry it forward to the judgment of conviction, which we now seek to have reviewed.

POINT II.

The evidence derived from interceptions was so inextricably mixed with other evidence as to be inseparable and, therefore, all of the evidence in both of these categories was inadmissible.

Any other conclusion than that stated would render nugatory the rule laid down by this court. It is not possible for a defendant in a criminal case to separate evidence unlawfully obtained and used as a foundation of a prosecution from other evidence derived directly or indirectly from it. It is not practicable to draw any line of demarcation which would accomplish in fact a metaphysical separation resting on pure theory, but having

no relation to facts or practical relation of facts. Since it is admitted by the chief government investigator that the interceptions made laid the foundation for the allegations of the particular crime and since it entered vitally into the allegations of the indictment (fols. 29-30), it is both impractical and illogical to require a defendant to trace every bit of evidence step by step back to its unlawful sources. In this instance there would be no case, if there were no interceptions.

POINT III.

There was error on the part of the trial court in declining to instruct the jury, as requested, that no declaration of a conspirator may be considered against a defendant unless and until the jury is satisfied that the defendant had entered into the conspiracy.

Error was assigned to this action of the court, an appropriate request had been made and an exception was taken (fols. 1583-1584). The point became vital because the witness Lancaster among others was permitted to give testimony with respect to boats the "Robbie" and the "Monolola", which goes back to January and February, 1935 (fols. 975-978), when according to Leveque's testimony he, the keystone of the conspiracy, had not even heard of Nardone and Hoffman until June or July, 1935 (fol. 652). He said that he was introduced to them later by Kleb, another alleged conspirator (fols. 654-655). The nebulous theory that all of the enterprises of persons who had been connected with Leveque in smuggling operations over the years were all united and bound up in one single unified conspiracy, because the operations were similar and Leveque was in them all, scarsely requires comment. The record will disclose the number of separate operations or conspiracies as they

are described by the government, carried out by different groups. To assume that there was but one conspiracy and that, therefore, any member of any of the groups must be considered as connected with anything done by any member of any other group is convenient but not logical. The well established rules governing the trial of conspiracy cases are nullified by this procedure. The result is to make it possible in any instance to punish one man for the sins of another. The loose method and the lax rules applied in conspiracy cases are well illustrated by the procedure followed in this cause. There is no logical reason given throughout the various trials and arguments, which would justify the court's refusal to instruct the jury as requested.

Conclusion.

It is urged that the petition presents important questions of wide application and public interest, questions involving not merely technical rules of evidence, but profound matters of public policy, and in addition a serious conflict between the decisions of this court and applicable decisions of other appellate courts on the one hand and the decision of the Circuit Court of Appeals in this cause, and that the nature of the questions and the conflict require the exercise of this court's supervisory jurisdiction.

Respectfully submitted,

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and
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